Supreme Court, U.S.
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Nos. 09-987, 09-988, 09-991

In the
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.

Petitioners,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Arizona Revised Statute (A.R.S.) section 43-1089 (Section 1089) is a facially neutral program of private choice in education. Most taxpayers who contribute to school tuition organizations under Section 1089 contribute to organizations that award scholarships to students attending religious schools. Did the Court of Appeals err in holding that Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause, when the State does nothing to influence the taxpayers' or the school tuition organizations' choice?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and Hawaii. PLF has participated as amicus in many cases involving kindergarten through 12th grade (K-12) education reform including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006); and *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999).

This case raises important issues of constitutional law as well as important policy considerations in the realm of K-12 education. Amicus believes that its

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eight years ago in *Zelman* this Court held a school choice program constitutional where the state gave tuition aid directly to parents that the parents could then use to cover tuition expenses at public or private schools. *Zelman*, 536 U.S. at 645-46, 663. The *Zelman* Court emphasized that the independent private choices of parents shielded the program from an Establishment Clause violation. *Id.* at 652. The existence of independent choice by nongovernment actors shows that the government is remaining neutral toward religion, and is not "respecting an establishment of religion" as prohibited by the First Amendment. U.S. Const. amend. I.

Ariz. Rev. Stat. § 43-1089 (Section 1089) provides for scholarships to students "to attend any qualified school of their parents' choice." Ariz. Rev. Stat. § 43-1089(H)(3). Unlike *Zelman*, however, the state does not give state funds directly to parents. Instead, Section 1089 creates a multi-faceted scheme whereby money can go to a sectarian school only if: (1) a Student Tuition Organization (STO) is created that independently chooses to provide scholarships to religious schools; (2) multiple taxpayers independently decide to donate a small ($500) amount to that STO in order to claim a tax credit; and (3) parents independently choose to apply for (and the STO grants) a scholarship for a student to attend a private, religious school. *See* Ariz. Rev. Stat. § 43-1089. Thus,

Section 1089 requires that numerous individuals make independent private choices before any donations (which are then claimed for tax credits) end up in sectarian schools. The independent choices here are significantly greater than were present in *Zelman*, and ensure that no one would consider that the State of Arizona directly funds religion.

While independent choice is fundamental to this Court's Establishment Clause jurisprudence, the freedom to choose also underscores the important policy implications of this Court's decision. All too often, government-run public schools provide a one-size-fits-all model to education. Conversely, school choice programs create incentives for schools to improve, and once choice is injected into state education systems, the positive results are dramatic. As a result of choice, programs throughout the country have improved student achievement and graduation rates almost universally. Moreover, school choice programs provide incentives for specialized schools that can care for those children most in need of increased attention and differentiated instruction. This is of particular importance in Arizona, where its state supreme court recently struck down a different school choice program designed to help the state's most needy children. *See Cain*, 202 P.3d 1178. In addition, school choice programs throughout the country save taxpayers millions of dollars. When schools compete for students, private schools in a competitive environment will spend more resources on instructional materials and less on bureaucracy. With states throughout the country facing severe budget deficits, the money saved from school choice programs cannot be discounted.

Section 1089 allows choice into Arizona schools. Throughout the country, where choice in education is present, parents, children, and taxpayers benefit. Section 1089 provides hope to thousands of Arizona families and this Court's decision will encourage other states to implement similar programs nationwide. Because Section 1089 requires independent choices from parents, taxpayers, and STOs before any money goes toward a religious school, it is neutral toward religion. This Court should therefore reverse the decision of the Court below.

ARGUMENT

I

SCHOOL CHOICE PROGRAMS THAT REQUIRE INDEPENDENT CHOICES BY NON GOVERNMENT ACTORS ARE NEUTRAL WITH RESPECT TO RELIGION

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947).

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any

> benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994).

In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995), this Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Also, in *Agostini v. Felton*, 521 U.S. 203, 231 (1997), this Court emphasized that a program does not create a financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And in *Mitchell*, a plurality of this Court observed that "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809 (plurality opinion).

When determining whether programs are neutral toward religion, the presence of independent choice by nongovernmental actors makes programs more likely to have the requisite neutrality. Indeed, this Court routinely emphasizes the importance of independent choice when deciding Establishment Clause challenges. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents,"); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("[P]ublic funds become available [to

sectarian schools] only as a result of numerous private choices of individual parents of school-age children."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) ("[A]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.").

In *Mitchell*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citing *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10). In these circumstances, "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citation omitted).

Much of the briefing in this case centers around the proper interpretation of *Zelman*, 536 U.S. 639. On the question of neutrality and choice, however, this Court was clear:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

> A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652.

The court below recognized the importance of independent private choice. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1015 (9th Cir. 2009). Yet, had the court below properly considered the interplay between neutrality and independent choice, Section 1089 would have survived constitutional scrutiny. Programs that require independent choices by nongovernment actors before any dollars can be accepted by a religious institution, satisfy the Establishment Clause's neutrality requirement. Indeed, what distinguishes this case from *Zelman* is the multiplicity of independent private choices that occur before a sectarian school provides a scholarship to any student. In his dissent to the denial of rehearing en banc, Judge O'Scannlain summarized the layers of choice inherent in Section 1089.

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide

> to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting).

The intent of Section 1089 was to provide "equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." *Winn*, 562 F.3d at 1012. Participation in Section 1089's scholarship program by both schools and school tuition organizations is based entirely on religiously neutral criteria. Ariz. Rev. Stat. § 43-1089(H)(2) & (3). No preference for religious schools is given; no preference for secular schools is given. *Id.*

Moreover, it is only through the "independent and private choices" of parents, school tuition organizations, and taxpayers that any government aid flows to a religious school. STOs decide what type of schools they want to support. Taxpayers decide which STOs they want to direct their money towards. Parents decide whether to apply for a scholarship from an STO. Because taxpayers and parents independently direct the flow of scholarships, public funds ultimately reach individual schools only as a result of the "genuinely independent and private choices" of multiple nongovernment actors. *See Zelman*, 536 U.S. at 651 (citing *Witters*, 474 U.S. at 487). This Court has consistently held that when "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval,' can be deemed to have been conferred on any

particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)); *see also Zelman*, 536 U.S. at 652.

Amicus believes that a school choice program that provides for the participation of all school children, allows taxpayers to fund the STO of their choice, and enables parents to apply to the STO of their choice, is entirely consistent with this Court's principles of neutrality and independent choice. Since this Court's landmark decision in *Zelman*, states across the country have been experimenting with different methods of increasing choice throughout their educational systems. The continued livelihood of many of these programs is dependent upon this Court's decision. This Court should reverse the court below, and reaffirm that the principles of neutrality and independent choice underscore its Establishment Clause jurisprudence.

II

WHEN CHOICE IS UNLEASHED IN EDUCATION, PARENTS, STUDENTS, AND TAXPAYERS REAP THE BENEFITS

Americans take advantage of choice every day, from which grocery store to patronize to which university to attend; those businesses strive to please their customers. However, unlike grocery stores and other important services that affect Americans on a daily basis, the current public education system often locks students into particular schools based solely on students' addresses. This system does not allow many options for parents when schools underperform or fail to meet their children's needs. *See generally* Greg Forster, *A Win-Win Solution: The Empirical Evidence*

on How Vouchers Affect Public Schools, The Friedman Foundation for Educational Choice, Feb. 2009, at 11 (Forster Article).[2] Though wealthy parents can move to another area or pay for private school tuition out of pocket, these options are not available to students from impoverished backgrounds. *Id.*

In dissent to the denial rehearing en banc here, Judge O'Scannlain recognized that the lower court's ruling could severely limit the availability of school choice options in states throughout the country.

> I dissent . . . because . . . the panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs. In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.

Winn, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting). Indeed, school choice is already playing an important role in solving this country's educational crisis by encouraging competition, increasing academic achievement, and lowering educational costs. At the beginning of 2009, there were already 24 school choice programs in 14 states and Washington, D.C. Forster Article at 10. "Over 160,000 students use these programs to attend private schools using public

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[2] *Available at* http://www.edchoice.org/Research/Reports/A-Win-Win-Solution----The-Empirical-Evdence-on-How-Vouchers-affect-Public-Schools.aspx (last visited Aug. 2, 2010).

funds," and these programs have shown dramatic success in the areas including parental benefits, student achievement, and lower educational costs. *Id.* To be sure, no two school choice programs are alike, but they are united in providing choice to parents who are otherwise locked into the public school in their geographical area. Indeed, Judge O'Scannlain recognized the similarity between Section 1089 and the "tax-credit schemes" in place (and being proposed) in numerous states throughout the country. *Winn*, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting) (citing Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6-3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. § 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Cal. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009)).

Without parental choice, schools "lack the positive incentive for better performance that most other types of service institutions take for granted." Forster Article at 11. Just as monopolies "provide poor quality because they have little incentive to serve their clients well[,]" so too, education services and schools' responsiveness to consumer demand deteriorates when suppliers are isolated from consumer preferences. *Id.* at 12. School choice programs break that monopoly, giving parents options and mobility, thereby disciplining inadequate schools and encouraging them to create a better learning environment for students. Thus, even public school students without vouchers benefit from school choice because these programs create competition among the existing public schools.

Therefore, it is unsurprising that school choice programs are very popular with parents. On the Florida Department of Education's website, parents have presented personal accounts of the way school choice has changed their lives. *See* Florida Department of Education, Office of Independent Education & Parental Choice, Scholarship Success Stories.[3] Some speak to the satisfaction that comes with selecting schools that suit their children's needs. *Id.* Other parents focus on their children's academic improvement, or how for the first time, students began to talk about college and their futures. *Id.* One pleased parent of a child in a Florida voucher program emphasized that school choice creates a system where educational decisions are in the hands of families—so parents "could no longer place the blame on others." *Id.*

A. School Choice Improves Students' Academic Achievement

School choice has been credited with improving academic achievement in K-12 education in locations across the country. In ten studies of school choice program cities across the nation[4], researchers used

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[3] *Available at* http://www.floridaschoolchoice.org/Information/success_stories/scholarships.asp (last visited Aug. 2, 2010).

[4] *See* The Foundation for Educational Choice, *Erasing the Myths of School Choice*, Feb. 28, 2009, *available at* http://www.edchoice.org/Research/Reports/Erasing-the-Myths-of-School-Choice.aspx (last visited Aug. 2, 2010); Jay Greene, Paul Peterson, & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment* in *Learning from School Choice* (Paul Peterson & Bryan Hassel eds. 1998); Cecilia Rouse, *Private School Vouchers and Student Achievement*, 113 Q. J. of Econ. 553 (May 1998), *available at* http://ideas.repec.org/p/pri/indrel/750.html (last visited Aug. 2, (continued...)

random-assignment methods to select students to receive an educational voucher. The results were unmistakable. For example, in *Erasing the Myths of School Choice*, researchers compared the progress of voucher students with a control group of students over periods from one to four years. The Foundation for Educational Choice, *Erasing the Myths of School Choice*. Researchers then randomly assigned which students received vouchers and which did not, while controlling for external factors such as previous academic achievement. *Id.* The voucher students routinely showed better academic outcomes than the control group. *Id.* More, the studies revealed no negative effects for voucher students. *Id.* In all but one, the positive results demonstrated, with a high level of statistical certainty, that the improved student achievement of all or most students was not mere coincidence, but instead directly correlated to the use of vouchers. *Id.* Reading and math levels increased

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[4] (...continued)
2010); Jay Greene, *Vouchers in Charlotte*, Education Next (Summer 2001), *available at* http://educationnext.org/files/ednext20012_46b.pdf (last visited Aug. 2, 2010); William Howell & Paul Peterson, *The Education Gap*, Brookings Institution Press, 2002 (revised 2006); John Barnard, et al., *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 J. Am. Statistical Assoc. 299 (June 2003), *available at* http://biosun01.biostat.jhsph.edu/~cfrangak/papers/sc/vouchers.pdf (last visited Aug. 2, 2010); Alan Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658 (Jan. 2004), *available at* http://ideas.repec.org/p/nbr/nberwo/9418.html (last visited Aug. 2, 2010); Joshua Cowen, *School Choice as a Latent Variable: Estimating the "Complier Average Causal Effect" of Vouchers in Charlotte*, 36 Policy Studies J. 301 (Nov. 2007), *available at* http://www3.interscience.wiley.com/journal/119400330/abstract?CRETRY=1&SRETRY=0 (last visited Aug. 2, 2010).

anywhere from five to eleven points compared to the control groups without vouchers. *Id.* Undoubtedly, some subgroups benefitted more than others from the voucher program (for example black students or students scoring below the city median generally showed more improvement). Nevertheless, half of the studies evidenced improvement for all voucher students. *Id.*

Moreover, numerous empirical studies[5] demonstrate how vouchers have improved Milwaukee public schools. In a 2002 study using a regression analysis of the Milwaukee voucher program, researchers found that "greater exposure to vouchers had a positive effect on year-to-year changes in public school outcomes." Forster Article at 17. That study found that the positive effect of exposure to vouchers was so strong that a school with all its students eligible for vouchers could be "expected to outperform a school

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[5] Caroline Minter Hoxby, *Rising Tide*, Education Next, Hoover Institution (Winter 2001), *available at* http://www.heartland.org/custom/semod_policybot/pdf/17457.pdf (last visited Aug. 2, 2010); Jay Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio*, Civic Bulletin, Manhattan Institute (Oct. 2002), *available at* http://www.manhattan-institute.org/pdf/cb_27.pdf (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, Staff Reports 315, Federal Reserve Bank of New York (Jan. 2008), *available at* http://ideas.repec.org/p/ecm/nasm04/221.html (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. Pub. Econ. 1371 (June 2008), *available at* http://ideas.repec.org/p/wpa/wuwppe/0512003.html (last visited Aug. 2, 2010).

with only half its students eligible by 15 percentile points over four years." *Id.*

In the Edgewood school district in San Antonio, Texas, where 93% of the students were eligible for lunch programs and where the district had a 97% Hispanic population, researchers used a program that provided vouchers for every student in the district. Greene & Forster, *Rising to the Challenge*, at 6. They found that Edgewood's "year-to-year test score gain outperformed those of 85 percent of school districts in Texas." *Id.* Researchers concluded that where strong competition from private schools was present, that "private schools . . . [drove] public school improvements." *Id.* at 7.

Graduation rates are also positively affected by school choice programs. In June, 2010 the U.S. Department of Education released its latest report on D.C.'s Opportunity Scholarship Program (OSP); researchers found that the offer of an OSP scholarship increased students' probability of completing high school by 12 percentage points overall. *See* Patrick Wolf, et al, *Evaluation of the DC Opportunity Scholarship Program: Final Report*, U.S. Department of Education Institute of Education Sciences, National Center for Educational Evaluation and Regional Assistance (2010).[6] The graduation rate was 82% for the group that had been offered vouchers, compared to 70% for the control group. *Id.* at 41. Additionally, the offer of an OSP voucher improved the graduation prospects of students by 13 percentage points. *Id.* at 41.

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[6] *Available at* http://ies.ed.gov/ncee/pubs/20104018/index.asp (last visited Aug. 2, 2010).

B. Special Needs Students Benefit from School Choice

Section 1089 specifically recognizes that STOs can be used to benefit special needs students. *See* Ariz. Rev. Stat. § 43-1089(H). Until last year, Arizona had a separate voucher program designed specifically for special need students. *See* Ariz. Rev. Stat. § 15-891 *invalidated by Cain*, 202 P.3d at 1185. The Arizona legislature, through its efforts with Section 1089 and the program struck down in *Cain*, have demonstrated a strong commitment to improving the educational circumstances of special needs students through vouchers.

As seen in numerous studies using random assignment methods, special needs students can benefit greatly from school choice programs. For instance, the McKay Scholarships for Students with Disabilities Program, afforded over 20,500 disabled Florida students the opportunity to attend a private school during the 2008-09 school year. Disabilities covered under the McKay program include K-12 students who are documented as having an intellectual disability; a speech or language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or autism spectrum disorder.

Researchers have compared special education services provided by public and private schools. In a study conducted by the Center for Civic Innovation at the Manhattan Institute, researchers compared the

services for participants in the McKay voucher program in both their private and public institutions. Jay P. Greene & Greg Forster, *Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program*, Center for Civic Innovation at the Manhattan Institute, Civic Report No. 38, June 2003.[7] Parents reported dramatically higher rates of satisfaction with their children's academic progress: 93% were satisfied with the McKay school verses 33% who were satisfied with their previous public school. *Id.* at 4. One reason for the difference in satisfaction levels may be because two-thirds of families reported that public schools failed to provide all of the special education services that they were required to provide by law, while only 12% reported that private schools did not provide services which they had promised to provide. *Id.* at 7.

This study also shows fewer instances of victimization and behavior problems in private schools than public schools. In public schools, nearly 47% of students were ridiculed for their disabilities and almost 25% were physically assaulted. *Id.* at 9. Conversely, the private schools showed only 5% who were bothered and 6% who were assaulted. *Id.* Similar programs for special needs students are in place in Georgia, Ohio, and Utah.

C. School Choice Lowers Educational Costs

School choice provides students with quality educations at a fraction of the cost. From 1990 to 2006, the nation's school choice programs saved a total of

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[7] *Available at* http://www.manhattan-institute.org/html/cr_38.htm (last visited Aug. 2, 2010).

$422 million for local school districts and $22 million for state budgets. Susan Aud, *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* (Apr. 2007), The Friedman Foundation for Educational Choice, Executive Summary.[8] Additionally, schools in choice programs generally operate on a tighter budget than district schools do, receiving from the government only about 80% per pupil of the amount received by district schools. Chester E. Finn, et al., *Charter School Funding: Inequity's Next Frontier*, Thomas B. Fordham Institute, Fordham Foundation, at Major Findings (2005).[9] In many states benefitting from school choice, local districts can retain a portion of funding which they would have spent on the students in choice programs; those extra tax dollars can be spread across the remaining public school students when enrollment declines take place. *See* Jay Greene, et al., *Expanding Choice in Elementary and Secondary Education*, Brown Center on Education Policy at the Brookings Institute (Feb. 2, 2010).[10]

In a Goldwater Institute study from 2005, analysts found that absent private schools, the State of Arizona and localities would have had to spend an additional $260 million during the 1999-2000 school year to educate the more than 44,000 children who

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[8] *Available at* http://www.heartland.org/custom/semod_policybot/pdf/21956.pdf (last visited Aug. 2, 2010).

[9] *Available at* http://www.defendcharterschools.org/CharterSchoolFunding.pdf (last visited Aug. 2, 2010).

[10] *Available at* http://www.brookings.edu/~/media/Files/rc/reports/2010/0202_school_choice/0202_school_choice.pdf (last visited Aug. 2, 2010).

reduced necessary public school expenditures by attending private schools. Ross Groen & Vicki Murray, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, Goldwater Institute Policy Report No. 199, at 16 (Jan. 5, 2005).[11] The study estimated, that from 2004 through 2016, if private schools continued to educate just 5% of the state's K-12 population, roughly 660,000 students would not have to be educated in public schools, saving the state roughly $2.6 billion. *Id.* at 18. The study noted that the savings from just one child beginning and completing their K-12 education in a private school could save the state and local governments nearly $100,000 over 13 years. *Id.*

In a related study, the Goldwater Institute conducted a survey of 325 private schools of which nearly 150 responded. Andrew J. Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute Policy Report No. 213, Goldwater Institute (Oct. 17, 2006).[12] The survey showed that Arizona private schools spent $5,545 per pupil, more than $2,000 less than the average Arizona public school which spent $7,644. *Id.* at 7. The study also showed that Arizona private school tuition was less than half of the per-pupil public school average revenue. *Id.* at 4. Even though the public schools were spending more money, private schools had higher high school graduation rates, higher college acceptance rates, and better school facilities. *Id.* at 3-6. In 2005,

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[11] *Available at* http://www.goldwaterinstitute.org/article/1299 (last visited Aug. 2, 2010).

[12] *Available at* http://www.goldwaterinstitute.org/article/1851 (last visited Aug. 2, 2010).

22.5% of Arizona private school students were receiving tuition tax credit scholarships under the Arizona Tuition Tax Credit program. *Id.* at 22.

Many respected empirical studies show that school choice has numerous positive benefits. Parents are able to find schools for their children which best suit their needs. Competition creates positive incentives for schools to improve and provide quality education. Students are no longer exclusively tied to public schools that have been determined for them by their addresses. Families of special needs students, minority students, and low-income students have options beyond moving to other districts or paying the entirety of private school tuition. School choice programs decrease educational costs and save states millions of dollars annually, and provide superior educational experiences. The ability of school choice to flourish is imperative because the success of future school choice programs is a key element in solving the current American K-12 educational crisis.

CONCLUSION

Since this Court's decision in *Zelman*, school choice has taken off in America. Hundreds of thousands of children have escaped failing government schools, seeking and finding wonderful educational opportunities. At less than the cost of public schools, school choice has improved student achievement, and provided special needs students with schools geared toward their unique requirements. As a result, school choice has been applauded by parents, students, and taxpayers nationwide.

This Court is now presented with a follow-up to *Zelman*. In ruling on Establishment Clause challenges to school programs in the past, this Court has continuously emphasized the importance of neutrality and independent choice. Arizona's Section 1089 fulfills both of these requirements. Section 1089 is neutral toward religion by not preferring sectarian over secular schools in either schools receiving funds or STOs that provide funds. Furthermore, Section 1089 has multiple levels of independent choice before any money can go to a sectarian school. Therefore, the Court should reverse the decision of the lower court.

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Respectfully submitted,

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